



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 15 CFR Part 922

[Docket No. 221006-0212]

RIN 0648-BL38

#### Flower Garden Banks National Marine Sanctuary Regulations

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Proposed rule; request for public comments.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) is issuing this proposed rule to remove a provision from one section of the existing Flower Garden Banks National Marine Sanctuary (FGBNMS) regulations, regarding the resolution of conflicting Federal agency regulations by the Director of the Office of National Marine Sanctuaries.

**DATES:** Comments must be received by [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NOS-2022-0047, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NOS-2022-0047 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

**Instructions:** Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by

NOAA. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NOAA will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:** George P. Schmahl, Superintendent, Flower Garden Banks National Marine Sanctuary, 4700 Avenue U, Building 216, Galveston, Texas 77551, at 409-356-0383, or *george.schmahl@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

*A. Flower Garden Banks National Marine Sanctuary*

The National Marine Sanctuaries Act (NMSA) authorizes the Secretary of Commerce (Secretary) to designate and protect, as national marine sanctuaries, areas of the marine environment that are of special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or aesthetic qualities. Day-to-day management of national marine sanctuaries is delegated by the Secretary to NOAA's ONMS. The primary objective of the NMSA is to protect nationally significant marine resources, including biological features such as coral reefs, and cultural resources, such as historic shipwrecks and archaeological sites. The mission of FGBNMS is to identify, protect, conserve, and enhance the natural and cultural resources, values, and qualities of the sanctuary and its regional environment for this and future generations.

FGBNMS is located in the northwestern Gulf of Mexico approximately 70 to 115 miles (113 to 185 kilometers) off the coasts of Texas and Louisiana. These offshore areas encompass a wide range of geologic features and habitat conditions that

support several distinct biological communities, including the northernmost stony coral reefs in the continental United States. The banks, reefs, and similar formations provide the foundation for essential benthic habitats that support a wide variety of species. They are home to the most significant examples of coral and algal reefs, mesophotic and deepwater coral communities, and other biological assemblages in the Gulf of Mexico. The combination of location and geology makes FGBNMS extremely productive and diverse, and presents a unique set of challenges for managing and protecting its natural wonders.

When NOAA first designated FGBNMS on December 5, 1991 (56 FR 63634), and Congress subsequently passed a law recognizing the designation on January 17, 1992 (Pub. L. 102–251, Title I, Sec. 101), the sanctuary consisted of only two areas known as East and West Flower Garden Banks (56 FR 63634). Among other things, FGBNMS regulated a narrow range of activities, established permit and certification procedures, and exempted certain U.S. Department of Defense (DOD) activities from the sanctuary’s prohibitions (56 FR 63634). The regulations also exempted activities necessary to respond to emergencies threatening life, property, or the environment (56 FR 63634). Those regulations became effective on January 18, 1994 (58 FR 65664). In 1996, Congress added Stetson Bank to the sanctuary (Pub. L. 104–283). The boundaries of Stetson Bank and West Flower Garden Bank were later amended to improve administrative efficiencies and increase the precision of all boundary coordinates based on new positioning technology (65 FR 81175, Dec. 22, 2000). Subsequently, on January 19, 2021, NOAA issued a final rule for the expansion of FGBNMS (86 FR 4953). The final rule went into effect on March 22, 2021 (86 FR 15404), and expanded the boundaries of FGBNMS from approximately 56 square miles to approximately 160 square miles (145 square kilometers to 414 square kilometers), and increased the number of protected reefs and banks (86 FR 4953). FGBNMS now protects East and West Flower

Garden Banks, Stetson Bank, Horseshoe Bank, MacNeil Bank, Rankin/28 Fathom Banks, Bright Bank, Geyer Bank, Elvers Bank, McGrail Bank, Bouma Bank, Sonnier Bank, Rezak Bank, Sidner Bank, Parker Bank, and Aldrice Bank.

The areas designated as FGBNMS are currently managed by several Federal agencies that share jurisdiction over the area and its resources. These agencies include: the U.S. Department of the Interior, Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE), who share primary jurisdiction over offshore energy exploration and development; the U.S. Environmental Protection Agency (EPA), which is responsible for protecting the quality of the nation's waters; NOAA's National Marine Fisheries Service (NMFS) and Gulf of Mexico Fishery Management Council (GMFMC), which jointly manage the U.S fisheries; and, as previously stated above, NOAA's ONMS, which provides comprehensive management and protection to the sanctuary. Additionally, DoD and U.S. Coast Guard activities, as well as commercial shipping and other marine activities, occur in and around the waters of FGBNMS.

B. *Summary of the Proposed Revision*

This action responds to the issues raised by Federal agency partners during interagency review of the final rule to expand FGBNMS (86 FR 4953), and during interagency review of a separate, unrelated interim final rule to update and reorganize the existing sanctuary regulations and eliminate redundancies (87 FR 29606). Specifically, the Federal agency partners expressed concern that the sanctuary regulation at 15 CFR 922.122(b) does not reflect existing practice and may be an overreach of the ONMS Director's delegated authority under the NMSA. Specifically, section 922.122(b) provides that if a Federal agency regulation and a Sanctuary regulation conflict, then the regulation deemed by the Director of the ONMS as being more protective of Sanctuary resources and qualities shall govern. The NMSA does not contain express language that

prescribes how potential conflicts with other Federal regulations are to be resolved. The NMSA instead establishes a framework “to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities” (16 U.S.C. 1431(b)(6)). The NMSA also “provide[s] authority for comprehensive and coordinated conservation and management of . . . marine areas, and activities affecting them, in a manner which complements existing regulatory authorities” (16 U.S.C. 1431(b)(2)). To ensure sanctuary regulations facilitate compatible use and complement existing regulatory authorities, the NMSA directs NOAA to consult with other Federal agencies on the proposed designation of new sites or expansion of existing sites (16 U.S.C. 1433(b)(2), 1434(a)(4)). It is through this consultation process, which occurs before the designation or expansion of sanctuaries, that potential conflicts among Federal agency regulations are typically resolved or avoided. NOAA is presently unaware of any situation in which 15 C.F.R. 922.122(b) has ever been triggered, and section 922.122(b) does not reflect NOAA’s preferred approach to resolve potential interagency regulatory conflicts. Therefore, to address the concerns raised by Federal partners, NOAA proposes to remove the existing language from 15 C.F.R. 922.122(b) to reflect existing practice and better track the NMSA. The remaining paragraphs of 15 C.F.R. 922.122 would remain unchanged.

A provision similar to 15 CFR 922.122(b) also appears in Article V of the terms of designation codified in appendix B of 15 C.F.R. part 922, subpart L. This action does not modify that provision. Pursuant to section 304(a)(4) of the NMSA, the terms of designation may only be modified by the same procedures by which the designation is made. The process includes scoping, proposal, consultation with Federal agency partners and public review, as well as review by Congress. Because additional procedures are

required to alter the terms of designation, NOAA is using regulatory action as the first step in the process.

## **II. Classification**

### *A. National Environmental Policy Act*

NOAA concludes that this action will not have a significant effect, individually or cumulatively, on the human environment. This action is categorically excluded from the requirement to prepare an Environmental Assessment or Environmental Impact Statement in accordance with the NOAA Categorical Exclusion G7 because there are no extraordinary circumstances precluding the application of this categorical exclusion. Specifically, this action is a notice of an administrative and legal nature, and any future effects of subsequent actions are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject to later NEPA analysis. This action would remove language that inaccurately describes how a conflict of regulatory authorities between Federal agencies would be addressed, and therefore, is an administrative issue. It does not commit the outcome of any particular Federal action taken by NOAA or other Federal agencies. Furthermore, individual Federal actions taken by ONMS or other Federal agencies will be subject to additional case-by-case analysis, as required under NEPA, which will be completed as any new Federal actions are submitted for specific projects and activities. In these situations, NOAA or other Federal agencies will ensure that the appropriate NEPA documentation is prepared prior to taking any final action. Any such NEPA analysis would describe the impacts of prospective projects or operations.

### *B. Executive Order 12866: Regulatory Impact*

This notice of proposed rulemaking has been determined to be not significant within the meaning of Executive Order 12866. NOAA has considered this action under E.O. 12866. Based on that review, this action is not expected to have an

annual effect on the economy of \$100 million or more, or have an adverse effect in a material way on the economy. Furthermore, this action would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this E.O.

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a rule, unless the head of the agency can certify, pursuant to 5 U.S.C. 605(b), that the action will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 605(b), the Chief Counsel for Regulations for the Department of Commerce has certified to the Office of Advocacy of the Small Business Administration that the proposed modifications of the regulations at 15 CFR part 922 would not have a significant economic impact on a substantial number of small entities.

Because the provision proposed to be removed from the FGBNMS regulations addresses potential conflicts of law between Federal agencies, NOAA does not anticipate any impact on small businesses. This proposed rule also does not establish any new reporting, recordkeeping, or other compliance requirements. This proposed action is strictly an administrative action with implications anticipated only on Federal agency partners. Further, since 15 CFR 922.122(b) has never been triggered, NOAA is strongly convinced there are no overarching impacts of this proposed administrative regulatory update on any party, whether Federal or otherwise.

Since the impacts of this proposed administrative rule are only intended as an administrative flexibility for Federal agencies, NOAA does not anticipate an impact on marine sanctuary stakeholders that entail small businesses, including entities in the following North American Industry Classification System (NAICS) categories: consumptive and non-consumptive recreational charter businesses (NAICS codes 483114 and 483112); commercial fishing businesses (NAICS codes 114112 (Shellfish Fishing), 114111 (Finfish and mackerel fishing), and 114119 (other marine fishing)); sightseeing businesses (NAICS code 487210); and diving businesses (NAICS codes 611620 (Sports and Recreation Instruction), 561990 (All Other Support Services), 339920 (Sporting and Athletic Goods Manufacturing), 459110 (Sporting Goods Retailers)).

Based on the analysis presented above, NOAA concludes that the proposed action would result in no negative impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required and none has been prepared.

#### **List of Subjects in 15 CFR part 922**

Administrative practice and procedure, Marine resources, Natural resources.

Nicole R. LeBoeuf,

Assistant Administrator

for Ocean Services and Coastal Zone Management,

National Ocean Service,

National Oceanic and Atmospheric Administration.

Accordingly, for the reasons set forth above, NOAA proposes to amend part 922, title 15 of the Code of Federal Regulations as follows:

#### **PART 922 - NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS**



1. The authority citation for part 922 continues to read as follows:

**Authority:** 16 U.S.C. 1431 et seq.

**§922.122 – [Amended]**

2. Amend §922.122 by removing and reserving paragraph (b).

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